

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

RECEIVED

JUN 8 4 25 PM '99

POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

COMPLAINT ON POST E.C.S.

Docket No. C99-1

**UNITED STATES POSTAL SERVICE
COMMENTS ON THE SPECIAL RULES OF PRACTICE
(June 8, 1999)**

On May 26, the Presiding Officer issued P.O. Ruling No. C99-1/2, requesting that participants provide comments on proposed Special Rules of Practice in Attachment A to that ruling. P.O. Ruling No. C99-1/2 also invited the Postal Service and other participants to submit proposed language for protective conditions to be used in this docket, and to identify when more or less stringent protective conditions may be appropriate. The Postal Service's comments on the suitability and content of the protective conditions are contained in a separate pleading filed today. Simultaneously with the filing of these comments, the Postal Service is filing a Motion for Partial Reconsideration of P.O. Ruling No. C99-1/2. Consistent with the Motion for Reconsideration and the arguments presented below, the Postal Service hereby offers its comments on, and proposed amendments to, the Special Rules of Practice.¹ The Postal Service has attached to this pleading a set of Proposed Special Rules from P.O. Ruling No. C99-1/2 that conform to these comments, with additions underlined and deletions stricken.

¹ By filing these comments, the Postal Service does not intend to manifest agreement with the Commission's conclusion in Order No. 1230 that its § 3662 complaint jurisdiction extends to the subject matter of the Complaint, *i.e.*, whether Post E.C.S. is a postal service subject to the procedures of chapter 36 of Title 39. The Postal Service, moreover, does not intend to waive its right to contest the Commission's jurisdiction to entertain the subject matter of the Complaint in this or any other proceeding.

CHANGES RELATED TO TIME PERIODS

P.O. Ruling No. C99-1/2 explains that the proposed Special Rules of Practice are intended to enable prompt consideration of the complaint, and avoid unnecessarily long time frames for filing pleadings. In furtherance of this objective, the proposed Special Rules shorten the period within which responses to discovery must be filed from 20 to 14 days, as well as the period within which responses to certain types of motions must be filed, from 10 days to 7 days. The Postal Service shares the Commission's objective in achieving a swift resolution of this proceeding. Several factors, however, militate against the adoption of Special Rules that compress certain time periods. Indeed, the Postal Service submits that the circumstances of this proceeding are unusual and warrant special consideration in the Special Rules of Practice.

First, the Postal Service faces resource constraints. It has not been practical to assemble a working team whose sole responsibility is handling matters related to the complaint. Consequently, persons within the Postal Service who have responsibility for management, operation, and sale of Post E.C.S. have not been given extra time or resources to handle the responsibilities that this proceeding has generated. It is therefore much more difficult for responsible persons to meet deadlines imposed by compressed time periods.

Second, as noted in the Postal Service's Response to UPS's Motion for Protective Order filed on May 25, there are several stakeholders whose commercial and proprietary interests are at stake in this proceeding. These include two foreign posts, the International Post Corporation, and a software supplier. Although these stakeholders are not participants in the proceeding, it is incumbent upon the Postal Service to keep these parties apprised of events in the proceeding and consult with them on matters that pertain to their interests. This has proven to be a time-consuming

exercise, particularly given the number of stakeholders involved. Furthermore, language barriers, national holidays in other countries, and unfamiliarity with U.S. law, particularly Commission practice, require that additional time and effort be devoted to consultations. Because stakeholders' representatives are located in multiple time zones, including continental Europe and the east and west coasts in North America, communication has proven to be difficult to coordinate.

Third, no special circumstances indicate that the Commission will be unable to address the limited issues raised by the complaint within a reasonable time. Thus, the Special Rules of Practice need not prescribe shortened periods in order to ensure timely completion of a recommended decision. That the Postal Service is requesting longer periods is not intended to imply, however, that it will not attempt to file materials early. Furthermore, the undersigned counsel has attempted to expedite matters by sending copies of pleadings to complainant's counsel by facsimile transmission, and, at the appropriate stage of the proceeding, will undertake to send electronic versions of discovery requests directed to complainant.²

For these reasons, the Postal Service urges the Presiding Officer to adopt the changes presented below to the proposed Special Rules of Practice concerning filing deadlines.

Special Rule 1C. The Postal Service proposes that the period for filing responses to motions to strike be extended from 7 days to 10 days. The latter is consistent with section 21 of the Commission's Rules of Practice and Procedure, which establishes a 10-day period for responding to motions.

Special Rule 2B. The Postal Service proposes that the period for responding to

² This procedure was successfully employed in Docket No. MC97-5.

motions to compel be extended by an additional 3 days, to 10 days, consistent with section 21 of the Commission's Rules of Practice and Procedure.

Special Rule 2C. The Postal Service proposes that the time period for responding to discovery be extended from 14 to 20 days, which is consistent with sections 25-27 of the Commission's Rules of Practice and Procedure.

Special Rule 5. The Postal Service proposes that a Special Rule of Practice be adopted to extend the time period for filing responses to motions (unless otherwise specified in the Special Rules) to 12 days. This would extend by 2 days the period for responding to motions, as specified in section 21 of the Commission's Rules of Practice and Procedure. The proposed change could be given effect by adding the following paragraph at the end of Special Rule 5:

Unless otherwise specified in the Special Rules of Practice, a Presiding Officer ruling, or a Commission order, within 12 days after a motion is filed, any participant to the proceeding may file and serve an answer in support of or in opposition to the motion pursuant to §§ 3001.9 to 3001.12.

DISCOVERY-RELATED AND MISCELLANEOUS CHANGES

The Postal Service also proposes the following additional changes to the proposed Special Rules of Practice.

Special Rule 1A. This Special Rule provides in part that a "participant's case-in-chief . . . shall include the participant's direct case and rebuttal, if any, to the United States Postal Service's case-in-chief." Special Rule 1A also provides that "[t]here will be a stage providing an opportunity to rebut presentations of other participants and for the Postal Service to present surrebuttal evidence."

These provisions, which are traditionally used in regular rate and classification dockets initiated by Postal Service requests, have not been tailored for this complaint

proceeding. In this case, the Postal Service will not be making the initial evidentiary presentation in this proceeding. Order No. 1239 and P.O. Ruling No. C99-1/2 clearly provide that UPS will file its case-in-chief first. Order No. 1239 specifically provides that there will be two stages in this proceeding: evidentiary presentations by complainant and other interested parties, followed by "an opportunity [for the Postal Service] to present its response." Order No. 1239 at 22. Special Rule 1A should accordingly be revised as follows:

A. *Case-in-chief.* A participant's case-in-chief shall be in writing and shall include the participant's direct case ~~and rebuttal, if any, to the United States Postal Service's case-in-chief.~~ It may be accompanied by a trial brief or legal memoranda. There will be a stage providing an opportunity ~~to rebut presentations of other participants and~~ for the Postal Service to present ~~surrebuttal~~ rebuttal evidence.

Special Rule 2A. As explained in the accompanying Motion for Reconsideration, the Postal Service proposes that the following sentence be added at the beginning of this rule:

A. *General.* Discovery on the Postal Service is limited to obtaining information relevant and material to the question of whether Post E.C.S. is a postal service.

Special Rule 2E. The Postal Service proposes two edits to Special Rule 2E. First, the last two sentences of Special Rule 2E should be removed from the Special Rules of Practice for this docket. These sentences in Special Rule 2E are intended for the specific purpose of *developing rebuttal testimony* to participants' direct cases, not for other, more far-reaching purposes. See, e.g., P.O. Ruling Nos. R97-1/85; R97-1/89; MC96-3/36 at 3; MC96-3/21 at 2; R87-1/138 at 2, R87-1/108. In the context of this proceeding, as in Docket No. C96-1; and as expressly provided in Order No. 1239 at 22, the sequence will be the complainant's and other participants' cases-in-chief

followed by the Postal Service's rebuttal. Indeed, Order No. 1239 does not contemplate that any participant other than the Postal Service is entitled to rebuttal. Order No. 1239 at 22. Hence, the last two sentences of Special Rule 2E are unnecessary, as no participant will need to conduct discovery on the Postal Service for the purpose of preparing rebuttal to complainant's case-in-chief.³

Special Rule 2E should also be amended to give effect to the prescribed sequence of evidentiary presentations, *i.e.*, the complainant's case-in-chief, followed by rebuttal by the Postal Service, as explicitly provided by Order No. 1239 at p.22. The Postal Service proposes the following replacement for the second sentence of Special Rule 2E:

With the exception of discovery on participants that file cases-in-chief, discovery against all participants, including the Postal Service, is scheduled to end prior to the filing of the complainant's case-in-chief. Discovery against complainant, and any other participant offering a case-in-chief, is scheduled to end prior to the receipt into evidence of complainant's case-in-chief.

Since Order No. 1239 contemplates that this will be a two-phase proceeding, there will be no need to conduct discovery (for the purpose of preparing rebuttal) on the Postal Service after the filing of UPS's case-in-chief. The Presiding Officer could defer whether written cross-examination will be available on any rebuttal filed by the Postal Service. In this regard, the Postal Service notes that written cross-examination is traditionally not available on rebuttal presentations. See, *e.g.*, P.O. Ruling No. R97-1/54, Attachment A. In Docket No. C96-1, however, the Presiding Officer directed that

³ Should there be any participants that intend to rebut complainant's case-in-chief with information available only from the Postal Service, undoubtedly such participants and the Postal Service would collaborate on the rebuttal presentation, so that formal discovery would not be necessary.

there be a brief period of written cross-examination on the Postal Service's rebuttal testimony. See P.O. Ruling No. C96-1/6 at 2. The Postal Service believes that this matter could be deferred until a participant formally requests the opportunity for written cross-examination on rebuttal testimony.

Special Rule 3D. The Postal Service proposes that the second sentence be modified to read as follows:

Where applicable, titles should identify the issue addressed and the relief requested, and the date of filing.

This measure will aid in organizing and filing hardcopy documents and enable prompt identification of the due date for responsive pleadings.

CONCLUSION

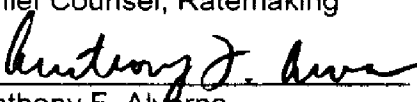
WHEREFORE, the Postal Service respectfully requests that the Presiding Officer adopt the proposed changes to the Special Rules of Practice.

The undersigned counsel has sent a copy of this document to counsel for complainant via facsimile transmission.

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking


Anthony F. Alverno
Attorney

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2997; Fax -6187
June 8, 1999

SPECIAL RULES OF PRACTICE

1. Evidence

A. Case-in-chief. A participant's case-in-chief shall be in writing and shall include the participant's direct case ~~and rebuttal, if any, to the United States Postal Service's case-in-chief.~~ It may be accompanied by a trial brief or legal memoranda. There will be a stage providing an opportunity ~~to rebut presentations of other participants and for the Postal Service to present surrebuttal~~ rebuttal evidence.

B. Exhibits. Exhibits should be self-explanatory. They should contain appropriate footnotes or narrative explaining the source of each item of information used and the methods employed in statistical compilations. The principal title of each exhibit should state what it contains or represents. The title may also contain a statement of the purpose for which the exhibit is offered; however, this statement will not be considered part of the evidentiary record. Where one part of a multi-part exhibit is based on another part or on another exhibit, appropriate cross-references should be made. Relevant exposition should be included in the exhibits or provided in accompanying testimony.

C. Motions to Strike. Motions to strike are requests for extraordinary relief and are not substitutes for briefs or rebuttal evidence. All motions to strike testimony or exhibit materials are to be submitted in writing at least 14 days before the scheduled appearance of the witness, unless good cause is shown. Responses to motions to strike are due within ~~seven~~ ten days.

D. Designation of Evidence from other Commission Dockets. Participants may request that evidence received in other Commission proceedings be entered into the record of this proceeding. These requests should be made by motion, should explain

the purpose of the designation, and should identify material by page and line or paragraph number. Absent extraordinary justification, these requests must be made at least 28 days before the date for filing the participant's direct case. Oppositions to motions for designation and/or requests for counter-designations shall be filed within 14 days. Oppositions to requests for counter-designations are due within 7 days. At the time requests for designations and counter-designations are made, the moving participant must submit two copies of the identified material to the Secretary of the Commission.

2. Discovery

A. General. Discovery on the Postal Service is limited to obtaining information relevant and material to the question of whether Post E.C.S. is a postal service.

Sections 25, 26 and 27 of the rules of practice apply during the discovery stage of this proceeding except when specifically overtaken by these special rules. Questions from each participant should be numbered sequentially, by witness.

The discovery procedures set forth in the rules are not exclusive. Parties are encouraged to engage in informal discovery whenever possible to clarify exhibits and testimony. The results of these efforts may be introduced into the record by stipulation, by supplementary testimony or exhibit, by presenting selected written interrogatories and answers for adoption by a witness at the hearing, or by other appropriate means.

In the interest of reducing motion practice, parties also are encouraged to use informal means to clarify questions and to identify portions of discovery requests considered overbroad or burdensome.

B. Objections and Motions to Compel Responses to Discovery. Upon motion of any participant in the proceeding, the Commission or the presiding officer may compel a more responsive answer, or an answer to an interrogatory or request for admission to which an objection was interposed, if the objection is overruled. Motions

to compel should be filed within 14 days of the answer or objection to the discovery request. The text of the discovery request, and any answer provided, should be provided in the text or as an attachment to the motion to compel.

Parties who have objected to interrogatories or requests for production of documents or items which are the subject of a motion to compel shall have ~~seven~~ ten days to answer. Answers will be considered supplements to the arguments presented in the initial objection.

C. Answers to Interrogatories. Answers to discovery are to be filed within ~~44~~ 20 days of the service of the discovery request. Answers to discovery requests shall be prepared so that they can be incorporated as written cross-examination. Each answer shall begin on a separate page, identify the individual responding, the participant who asked the question, and the number and text of the question.

Participants are expected to serve supplemental answers to update or to correct responses whenever necessary, up until the date that answers are accepted into evidence as written cross-examination. Participants filing supplemental answers shall indicate whether the answer merely supplements the previous answer to make it current or whether it is a complete replacement for the previous answer.

Participants may submit responses with a declaration of accuracy from the respondent in lieu of a sworn affidavit.

D. Follow-up Interrogatories. Follow-up interrogatories to clarify or elaborate on the answer to an earlier discovery request may be filed after the initial discovery period ends. They must be served within seven days of receipt of the answer to the previous interrogatory unless extraordinary circumstances are shown.

E. Discovery to Obtain Information Available Only from the Postal Service. Sections 25 through 27 of the rules of practice allow discovery reasonably calculated to lead to admissible evidence during a noticed proceeding with no time limitations.

~~Generally, discovery against a participant is scheduled to end prior to the receipt into evidence of that participant's direct case. With the exception of discovery on participants that file cases-in-chief, discovery against all participants, including the Postal Service, is scheduled to end prior to the filing of the complainant's case-in-chief. Discovery against complainant, and any other participant offering a case-in-chief, is scheduled to end prior to the receipt into evidence of complainant's case-in-chief. An exception to this procedure shall operate when a participant needs to obtain information (such as operating procedures or data) available only from the Postal Service. Discovery requests of this nature are permissible up to 20 days prior to the filing date for final rebuttal testimony.~~

3. Service

A. Receipt of Documents. The Service List shall contain the name and address of up to two individuals entitled to receive copies of documents for each participant. If possible that entry will also include a telephone number and facsimile number.

B. Service of Documents. Documents shall be filed with the Commission and served upon parties in accordance with sections 9 through 12 of the Commission's rules of practice. Participants capable of submitting documents stored on computer diskettes may use an alternative procedure for filing documents with the Commission. Provided that the stored document is a file generated in either Word Perfect 5.1 or any version of Microsoft Word, and is formatted in Arial 12 font, in lieu of the requirements of section 10 of the rules, a participant may submit a diskette containing the text of each filing simultaneously with the filing of 1 (one) printed original and 3 (three) hard copies.

C. Exceptions to general service requirements for certain documents.
Designations of written cross-examination, notices of intent to conduct oral cross-examination, and notices of intent to participate in oral argument need to be served only

on the Commission, the OCA, the Postal Service, and the complementary party (as applicable), as well as on participants filing a special request for service.

Discovery requests and pleadings related thereto, such as objections, motions for extensions of time, motions to compel or for more complete answers, and answers to such pleadings, must be served only on the Commission, the OCA, the Postal Service, the complementary party, and on any other participant so requesting, as provided in sections 25-27 of the rules of practice. Special requests relating to discovery must be served individually upon the party conducting discovery and state the witness who is the subject of the special request.

D. Document titles. Parties should include titles that effectively describe the basic content of any filed documents, and the date of filing. Where applicable, titles should identify the issue addressed and the relief requested. Transmittal documents should identify the answers or other materials being provided.

4. Cross-examination

A. Written cross-examination. Written cross-examination will be utilized as a substitute for oral cross-examination whenever possible, particularly to introduce factual or statistical evidence.

Designations of written cross-examination should be served no later than three working days before the scheduled appearance of a witness. Designations shall identify every item to be offered as evidence, listing the participant who initially posed the discovery request, the witness and/or party to whom the question was addressed (if different from the witness answering), the number of the request and, if more than one answer is provided, the dates of all answers to be included in the record. (For example, "OCA-T1-17 to USPS witness Jones, answered by USPS witness Smith (March 1, 1997) as updated (March 21, 1997))." When a participant designates written cross-

examination, two copies of the documents to be included shall simultaneously be submitted to the Secretary of the Commission.

The Secretary of the Commission shall prepare for the record a packet containing all materials designated for written cross-examination in a format that facilitates review by the witness and counsel. The witness will verify the answers and materials in the packet, and they will be entered into the transcript by the presiding officer. Counsel for a witness may object to written cross-examination at that time, and any designated answers or materials ruled objectionable will be stricken from the record.

B. Oral cross-examination. Oral cross-examination will be permitted for clarifying written cross-examination and for testing assumptions, conclusions or other opinion evidence. Notices of intent to conduct oral cross-examination should be delivered to counsel for the witness and served three or more working days before the announced appearance of the witness, and should include (1) specific references to the subject matter to be examined and (2) page references to the relevant direct testimony and exhibits.

Participants intending to use complex numerical hypotheticals or to question using intricate or extensive cross-references, shall provide adequately documented cross-examination exhibits for the record. Copies of these exhibits should be delivered to counsel for the witness at least two calendar days (including one working day) before the witness's scheduled appearance.

5. General

Argument will not be received in evidence. It is the province of the lawyer, not the witness. It should be presented in brief or memoranda. Legal memoranda on matters at issue will be welcome at any stage of the proceeding.

New affirmative matter (not in reply to another party's direct case) should not be included in rebuttal testimony or exhibits.

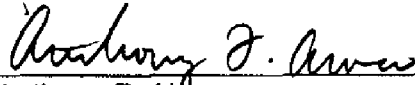
Cross-examination will be limited to testimony adverse to the participant conducting the cross-examination.

Library references may be submitted when documentation or materials are too voluminous reasonably to be distributed. Each party should sequentially number items submitted as library references and provide each item with an informative title. Parties are to file and serve a separate Notice of Filing of Library Reference(s). Library material is not evidence unless and until it is designated and sponsored by a witness.

Unless otherwise specified in the Special Rules of Practice, a Presiding Officer ruling, or a Commission order, within 12 days after a motion is filed, any participant to the proceeding may file and serve an answer in support of or in opposition to the motion pursuant to §§ 3001.9 to 3001.12.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.



Anthony F. Alverno

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2997; Fax -6187
June 8, 1999